Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into Accutel Communications, Inc., d.b.a. Florida Accutel Communications, Inc. (U-5865).	Investigation 99-04-023 (Filed April 22, 1999)

Early, Lennon, Peters & Crocker, by David Crocker, Attorney at Law, and Lawrence Brenton, for Accutel Communications, Inc., respondent.
Cleveland Lee, for the Legal Division.

O P I N I O N

Summary

This decision finds that Accutel Communications, Inc., (Accutel) is in violation of three sections of the Public Utilities Code, as well as two general orders of the Commission.

In violation of Pub. Util. Code § 451, Accutel billed at least 43,992 California customers for products or services which were either not ordered or not authorized by those customers. This is a practice referred to as "cramming" for which Accutel is additionally found to be in violation of Pub. Util. Code § 2890. However, many customers have already been reimbursed for charges unlawfully billed.

We also find that Accutel is in violation of Pub. Util. Code § 2889.5 in that Accutel switched without authorization the long distance carrier of at least 34

California consumers. The practice of switching, without authorization, a consumer's presubscribed toll call or long-distance carrier is referred to as "slamming."

We also find that Accutel failed to comply with the reporting requirements of General Order (GO) 96-A and GO 104-A.

Based on the totality of the circumstances, Accutel is ordered to pay a fine to the State of California's General Fund of $1,520,000 of which $760,000 is suspended.

Background

On April 22, 1999, we initiated this proceeding by issuing an Order Instituting Investigation (OII) based on allegations made by the Commission's Consumer Services Division (CSD) that Accutel was billing consumers an unauthorized monthly recurring service charge of $4.95. The OII, which also served as a scoping memo, asked whether the operations and practices of Accutel violated:

- Pub. Util. Code § 451[1] by billing California consumers for products and/or services not ordered or authorized by the consumer, a practice known as "cramming";

- Section 2890 by cramming subsequent to January 1, 1999;

- Section 2889.5 by "slamming," i.e., switching without authorization, California consumers' presubscribed toll call or long-distance carrier to another carrier or to Respondent; or

[1] Unless stated otherwise, all statutory references are to the California Public Utilities Code.

- GO 96-A and GO 104-A by not meeting reseller tariffing, notice, and recordkeeping requirements.

On June 22, 1999, Administrative Law Judge (ALJ) DeUlloa held a prehearing conference (PHC) to determine a schedule for evidentiary hearing. A second PHC was held on August 13, 1999, to discuss discovery issues. Five days of evidentiary hearing were held on August 24, 25, 26, 27 and September 10, 1999. CSD filed its opening brief and reply brief on November 12 and 24, 1999, while Accutel filed its opening brief and reply brief on November 16 and 29, 1999. On September 7, 1999, CSD filed a motion requesting that Accutel demonstrate financial solvency or post a performance bond, and on September 22, 1999, Accutel filed a response to the motion. This matter was submitted on November 29, 1999. Decision (D.) 00-06-070 extending the statutory deadline was issued on June 22, 2000. On October 25, 2000, the Presiding Officer's Decision (POD) in this matter was mailed to parties. On November 27, 2000, CSD filed an appeal.

Cramming (Pub. Util. Code §§ 451 and 2890)

Both §§ 451 and 2890 prohibit cramming. In Coral, we concluded that §451 requires that all public utility charges and terms of service be just and reasonable.[2] Further, we stated that:

> "[p]lacing charges on a person's local telephone bill based on an invalid 'authorization' is unreasonable. Unreasonable practices are prohibited by § 451."[3]

[2] D.01-04-035, conclusion of law 5.

[3] Id. at page 27, mimeo.

Section 2890 sets forth specific requirements for inclusion of charges on consumers' telephone bills. In relevant part, § 2890 states:

> "(a) A telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized. …"

Position of CSD

CSD contends that Accutel violated § 451 by imposing a monthly service charge of $4.95 on consumers' telephone bills for a calling card not authorized by consumers. In support of its position, CSD states that the Commission's Consumer Affairs Branch (CAB) received 234 cramming/slamming complaints about Accutel from January 1998 through May 1999. Further, CSD alleges that Pacific Bell (Pacific) logged 689 cramming complaints against Accutel during 1998. Additionally, from July 10, 1997, through August 8, 1999, CSD asserts that OAN Services, Inc. (OAN) billed and collected on behalf of Accutel 55,000 California Billing Telephone Numbers (BTNs) and of these credited 43,992 BTNs.[4]

CSD rejects Accutel's defense that cramming complaints are attributable to other calling card companies for which Accutel acted as a billing agent. CSD argues that Accutel is legally accountable for the cramming violations, regardless of whether Accutel processed billings for other companies, since California customers were always billed in the name of Accutel. CSD also asserts that by agreement with OAN and under law, Accutel was only allowed to

[4] OAN is the entity that processed Accutel's charges and caused such charges to appear on consumers' phone bills.

charge for services or products that California customers had originated through Accutel and not on behalf of other companies.

Position of Accutel

Accutel describes itself as a non-facilities based reseller of long distance services. In addition to providing both retail and wholesale products, Accutel states it also acted as a billing agent for its resellers and calling card companies.

In order to bill consumers, Accutel contracted with OAN. Accutel states that it transmitted data to OAN which then processed and transmitted the data to the local exchange carriers for billing.

Accutel does not dispute that unauthorized charges appeared on consumers' phone bills. However, Accutel contends that the erroneous charges made in late 1998 and early 1999 relate primarily to billings it processed on behalf of other calling card companies. Specifically, Accutel was contacted in Spring 1998 by Bonneville Marketing to act as a billing agent for Coral Communications, PCI, Veterans Association of America, Advantage Auto Club and American Network, and also to provide underlying carrier services for the companies' calling cards. In 1998, Accutel provided billing and rating services for these calling card companies, including billing for a monthly service charge.

Accutel states that after it commenced billing the monthly service charges, consumers began complaining. In response to the complaints, Accutel states that it adopted a "no questions asked" policy, and that it authorized credits to those consumers who complained. Further, Accutel states that it terminated its contracts with the calling card companies in late summer or early Fall 1998. Accutel asserts that at least two months were needed to implement internal corrections of the problems caused by the calling card companies.

Accutel contends that it executed the directions of the calling card companies when it transmitted the data to OAN, which processed and transmitted the data to the local exchange carriers for billing to cardholders. Accutel argues that it acted as a billing agent for calling card companies and should therefore not be held responsible for the unauthorized charges. Accutel also argues that D.99-08-017 supports its position because the Commission found that Accutel was acting as a billing agent for Coral Communications.

Discussion

It is uncontested that unauthorized charges appeared on consumers' telephone bills. On behalf of Accutel, OAN billed consumers a $4.95 monthly service charge. In response to consumer complaints that the charge was not authorized, OAN provided credits to approximately 43,992 consumers.[5] Accutel did not dispute the number of credits, but instead attributed the unauthorized charges to other calling card companies for which Accutel asserts it provided billing services. These credits support a finding that at least 43,992 incidents occurred in which unauthorized charges were imposed on consumers' phone bills.

The dispute is whether Accutel should be held responsible for these uncontested unauthorized charges imposed on consumers' telephone bills. In essence, Accutel claims it is an innocent third-party. Accutel attributes liability for the unauthorized charges to other calling card companies. In addition,

[5] The data presented reflected the number of billing telephone numbers (BTNs) credited. A consumer may have more than one BTN, therefore, the number of consumers affected is an approximation.

Accutel states it mitigated the situation by taking actions to halt unauthorized charges and also adopting a "no questions asked" refund policy.

CSD substantiated Accutel's mitigation efforts. For instance, CSD sponsored a witness from Pacific who stated that the number of complaints about Accutel declined dramatically in 1999, consistent with the actions Accutel claimed it took to remedy increased consumer complaints.[6] When Accutel ceased providing billing services to calling card companies, it appears that cramming problems abated. CSD also substantiated Accutel's assertion of a helpful "no questions asked" refund policy. CSD's consumer witnesses testified that when Accutel was contacted it was helpful and responsive.

Accutel's defense is not an issue of first impression. In Coral, the Commission addressed this issue with the same actors involved in this proceeding. In Coral, the Commission dismissed OAN's defense that it was an innocent third party and did not knowingly cooperate with other telecommunication firms involved in wrongful billing. The Commission stated that:

> OAN attempts to shield its role in this billing by blaming its client, Accutel. Again, OAN misses the point. OAN willingly engaged in a business relationship with Accutel. OAN's business judgment turned out to be faulty as Accutel is accused of widespread violations of the Public Utilities Code. … Unlike customers, OAN could and should have prevented the entire transaction. OAN is in the business of providing billing services. Pacific Bell's tariffs place the duty to present only authorized billings squarely on OAN.

[6] The last three months of recorded data concerning incidents of cramming reported by Pacific for Accutel were 3, 8 and 0.

> Accutel is not the first billing and collection customer to place unauthorized charges on local telephone bills. OAN should have taken reasonable steps to ensure that Accutel's billings were authorized. (D.01-04-035 at pp. 53-54, mimeo.)

In this instance, Accutel bears the same burden to ensure that consumers in fact had authorized the $4.95. Accutel is responsible for the billings it processed for third-party calling card companies. Accutel cannot escape responsibility by claiming it was unaware that charges it processed were not authorized. Additionally, later efforts to remedy the situation do not relieve Accutel of responsibility to comply with §§ 451 and 2890. Consequently, we find Accutel accountable for the 43,992 unauthorized charges that appeared on consumers' telephone bills. We agree with CSD's assertion that such unauthorized charges are unreasonable and therefore violate §§ 451 and 2890.

We are uncertain about the economic harm caused to the public since the majority of consumer witnesses that CSD sponsored also testified that they had been reimbursed for unauthorized charges. Similarly, most of the consumers interviewed by CSD stated that they had received credits for erroneous charges. Further, Accutel testified that as a matter of practice it made refunds to all consumers who requested credits. It also appears from some of CSD's exhibits that both OAN and Pacific provided credits to consumers.

In summary, the record indicates that cramming occurred and that affected consumers received credits for unauthorized charges.

Slamming (Pub. Util. Code § 2889.5)

Section 2889.5 prohibits switching a consumer's long-distance carrier without their knowledge or authorization. Section 2889.5 sets forth specific steps that must occur prior to changing a consumer's telephone service provider.

Position of CSD

CSD presented three consumers[7] who testified that their long-distance carrier had been switched to Accutel without their knowledge or authorization. Two CSD investigators[8] also sponsored testimony that consisted of interviews of consumers who had complained to Pacific concerning changes to their long-distance carrier. CSD investigators found that many of the consumers who had complained to Pacific had not authorized changes to their long-distance carrier. Out of a total of 168 interviews conducted by CSD, 34 consumers reported being slammed by Accutel.[9]

In its opening brief, CSD also responded to Accutel's assertion that Christian Communications, Inc. (CCI) sold Accutel five to ten thousand BTNs that lacked customer authorization, and that Telecommunications Service Center, Inc. (TSC), a billing agent, transmitted billings to OAN that had no customer authorizations. CSD asserts that even if these alleged events took place, none of them excuse Accutel from accountability and legal responsibility for the slamming violations. CSD argues that the "record proves that Accutel also slammed on a massive scale." CSD states that the record presents the Commission with a range of possible slamming violations, from 46 to 12,951.[10]

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[7] Jean Marinelli, Melodye LeVier, and Andrew Lane.

[8] Steve Northrop and Dao Phan.

[9] In its opening brief at page 18, CSD asserts that forty-three consumers were slammed. In its appeal of the POD, CSD revises its estimate to 34.

[10] CSD's range represents the potential number of customers that Accutel served. CSD assumes that all such customers were slammed.

Position of Accutel

Accutel argues that it had relatively few slamming complaints for the calendar year 1997 and that the complaints that did occur were associated with Accutel's purchase of CCI's customer base. Additionally, in late 1997, Accutel states that it contracted with TSC to provide billing and rating services. However, Accutel asserts that TSC mixed the billings of Accutel's customers and other carriers for which it provided billing and rating services. Accutel believes that TSC's practice resulted in complaints to Accutel in late 1997 and early 1998.

Discussion

We find that Accutel was involved in at least 34 incidents of slamming. Again, Accutel raises an innocent third-party defense. As is the case for cramming, Accutel cannot exonerate itself for slamming offenses by pointing to the conduct of others. We agree with CSD that even if the purchase of CCI's customer base or TSC's mixed billings resulted in consumers' long distance carrier provider being changed, none of these events excuse Accutel from accountability and legal responsibility for the slamming violations.

However, CSD wants the Commission to infer that substantially all of Accutel's customers were slammed based on (1) CSD's confirmation of relatively few instances of slamming, and (2) Accutel's inability to produce customer authorizations for its alleged customers.

The record does not support a finding that all of Accutel's customers were slammed. Accutel's database at one time may have contained 12,951 customers; however, it does not automatically follow that all such consumers were all slammed. CSD's own interviews of consumers, who complained to CAB or their local exchange company, found that approximately 20% of the 168 interviewed claim to have been slammed. Moreover these consumers are not

representative of all Accutel's customers since CSD interviewed only those persons who had complained.

CSD admits that it has not "confirmed the existence, number, and scope of Accutel's slamming" because Accutel has not produced customer authorizations. In its appeal, CSD contends that the Presiding Officer's Decision ignores a "glaring absence of proof, and consequently in effect 'rewards' Accutel for withholding information from CSD."

We reject CSD's reasoning. CSD has the burden to show that slamming occurred. Procedures (such as discovery) and procedural tools (such as motions to compel) exist for acquiring information from a respondent. Discovery concerns should be addressed early in a proceeding with motions to compel production of documents. Despite an ALJ inquiry regarding the need for a postponement, CSD requested that the evidentiary hearing go forward as long as Accutel is prohibited from introducing any evidence not already produced to CSD. CSD asks us to make a finding based on the "absence of proof" but yet it has not availed itself of procedural tools to acquire such proof in advance of hearing and actually insists that respondent be prohibited from producing proof of authorization at hearing. Consequently, we will not infer that all of Accutel's customers were slammed.[11]

GO 96-A and GO 104-A

The record shows that Accutel has failed to submit to the Commission all documents required by GO 96-A and GO 104-A. Accutel admits that its

[11] Our holding is narrow and applies to the particular instance where a party has not availed itself of available discovery tools and conditioned hearings on preventing another party from presenting exculpatory evidence.

accountants have not timely filed financial reports, but asserts that its billing problems have delayed completion of its annual report.

CSD did not thoroughly address GO 96-A and GO 104-A violations in its briefs. The degree of non-compliance, if any, that occurred is unclear. The record is insufficient to warrant sanctions for non-compliance with GO 96-A and GO 104-A. Regardless, we will order that Accutel obey and comply with all applicable laws and all applicable orders and rules of the Commission.[12]

CSD's Motion

On September 7, 1999, CSD filed a motion requesting that Accutel demonstrate financial solvency or post a performance bond. The alleged "facts" CSD cites in support of its motion almost entirely concern discovery disputes between Accutel and CSD. Accutel also responds that the motion omits reference to evidence developed during five days of hearing.

Assuming that CSD's representations are true, the appropriate remedy would be an order compelling production of documents. The alleged facts cited by CSD do not support the requested remedy. CSD's motion should be denied.

Sanctions

In D.98-12-075, the Commission developed principles that it would consider in setting the appropriate fine to impose in the enforcement of affiliate transaction rules. The principles developed in D.98-12-075 distill numerous Commission decisions concerning fines in a wide range of cases. Thus, we look to these principles in determining an appropriate fine.

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[12] The Secretary of State's web site shows Accutel as having "forfeited" its right to do business in California. Compliance with applicable laws includes compliance with the registration requirements of the Secretary of State.

Reparations should be distinguished from fines. Reparations are not fines and conceptually should not be included in setting the amount of a fine. Reparations are refunds of excessive or discriminatory amounts collected by a public utility. (Section 734.) The purpose of reparations is to return unlawfully collected funds to the victim. Accordingly, the statute requires that all reparation amounts be paid to the victims. The record developed in this proceeding indicates that consumers who may have been crammed or slammed by Accutel have received credits and been made financially whole. Thus, the record does not support the need for further reparations.

The purpose of a fine is to go beyond reparation to the victim and to effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California, rather than to victims.

Effective deterrence creates an incentive for public utilities to avoid violations. Deterrence is particularly important for violations which could result in public harm. The two general factors used by the Commission in setting fines are (1) severity of the offense and (2) conduct of the utility. Fines should be set in proportion to the violation.

The severity of the offense includes several considerations. Economic harm reflects the expense that was imposed upon the victims as well as any unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in establishing the fine. Compliance with Commission directives is required of all California public utilities:

> "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to

> secure compliance therewith by all of its officers, agents, and employees." (Section 702.)

Such compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, is considered a severe offense.

D.98-12-075 also stated that the number of the violations is a factor in determining the severity. A series of temporally distinct violations can suggest an on-going compliance deficiency that the public utility should have addressed after the first instance. Similarly, a widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope. For a "continuing offense," § 2108 counts each day as a separate offense.

D.98-12-075 also recognizes the important role of the public utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation. The public utility is responsible for the acts of all its officers, agents, and employees:

> "In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his [or her] official duties or employment, shall in every case be the act, omission, or failure of such public utility." (Section 2109.)

D.98-12-075 also weighs the utility's actions to prevent a violation. Prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable laws and regulations, and most critically, reviewing its own operations regularly to ensure full compliance. In evaluating the utility's efforts

to ensure compliance, the Commission will consider the utility's past record of compliance with Commission directives.

The utility's actions to detect a violation are also a factor. The Commission expects public utilities to diligently monitor their activities. Where utilities for whatever reason failed to meet this standard, the Commission will continue to hold the utility responsible for its actions. Deliberate, as opposed to inadvertent, wrongdoing will be considered an aggravating factor. The Commission will also look at management's conduct during the period in which the violation occurred to ascertain the level and extent of involvement in or tolerance of the offense by management personnel.

Prompt reporting of violations furthers the public interest by allowing for expeditious correction. For this reason, steps taken by a public utility to promptly and cooperatively report and correct violations may be considered in assessing any fine.

The financial resources of the utility are another factor. Effective deterrence also requires that the Commission recognize the financial resources of the public utility in setting a fine that balances the need for deterrence with the constitutional limitations on excessive fines. Some California utilities are among the largest corporations in the United States and others are extremely modest, one-person operations. The Commission intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

The Commission will also apply a totality of the circumstances test in furtherance of the public interest. Setting a fine at a level that effectively deters further unlawful conduct by the subject utility and others requires that the Commission specifically tailor the package of sanctions, including any fine, to the

unique facts of the case. The Commission will review facts that tend to mitigate the degree of wrongdoing as well as any facts that exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.

We now apply these principles to the case at bar. Accutel has violated § 451 by placing on consumers' phone bills a monthly charge for a calling card not authorized by consumers. As discussed below, we will assess a fine of $760,000.

Pursuant to § 2107, CSD asserts that we could assess a fine between $500 and $20,000 per violation. However, following CSD's recommended protocol would result in a total fine between $22 million and $880 million.[13] CSD cites no Commission decision resulting in such a large fine for a carrier having a similar number of customers (roughly 45,000 to 55,000 customers). Although, the Commission could in theory construe § 2107 in the manner proposed by CSD, in similar situations the Commission has instead relied on the number of days the offense has continued.

Recently, in Investigation (I.) 98-08-004, into the operations, practices, and conduct of Coral Communications, Inc. et.al., (Coral), we issued D.01-04-035, which addressed among other things penalties for cramming. In D.01-04-035, we applied the principles enunciated in D.98-12-075 for setting a fine for cramming violations; and we follow a similar approach here. In Coral, we first looked at the severity of the offense, which we defined as the amount wrongfully obtained.

[13] Number of offenses is equal 44,026 (43,992 cramming plus 34 slamming).

In the present case, although the record is unclear,[14] we can reasonably estimate that customers were billed $4.95 for two to three months on average prior to correction of the problem. Consequently, the amount wrongfully obtained from consumers was in the range of $435,000 to $654,000.[15] Second, concerning conduct, in Coral we found that the unauthorized billing was the intended result of a "calculatedly deceptive promotional campaign to enlist customers under the guise of a sweepstakes." The opposite is true in the present case. Accutel did not engage in a sweepstakes or otherwise market its services deceptively. Accutel has admitted that, in obtaining customer lists from other carriers who themselves had not obtained proper authorizations from all customers, it caused some consumers to be crammed or slammed. Accutel took steps to resolve these incidents; specifically, and most importantly, Accutel adopted a "no questions asked" policy concerning refunds to consumers for erroneous charges.

The next factor the Commission applied in Coral is the totality of the circumstances test in furtherance of the public interest. In Coral, we found:

> "widespread brazen acts to bill California end use customers for unauthorized services and charges. The public interest requires strong deterrence of future schemes of this type. The fine level should be set accordingly high." (Id. mimeo at p.55)

In the present case, the record does not support a finding that Accutel intended to defraud consumers, as was the case in Coral. However, Accutel's actions do reflect some level of negligence. For example, Accutel could have taken more precautions to verify the validity of consumer lists. Consequently, the fine level

[14] CSD provided wide ranging estimates.

[15] 44,026 (offenses) times $14.85 (3 months x $4.95 per month).

should be set at a low to moderate level that takes into account Accutel's remedial efforts.

The final factor we addressed in Coral was whether the number of violations used in calculating the fine should equal the number of consumers affected or duration (in days) of the misleading promotional activity. We there noted that imposing a fine based on the number of customers affected (258,000) multiplied by the lower end of the statutory fine range ($500) would result in a fine of over a $100 million. We declined to use number of customers, and instead we based our calculation on the number of days the carrier was in wrongful operation. We then multiplied the number of days by $10,000, which resulted in a fine of $5.1 million. We also observed in Coral the prior precedent for suspending a portion of a fine.[16]

In the present case, the record is unclear as to the length of time cramming occurred. CSD has alleged that Accutel crammed consumers for a two-year period, January 1997 to January 1999, or 760 days.[17] Applying the same approach as in Coral, we calculate a fine range between $380,000 (760 days x $500/day) and $15,200,000 (760 days x $20,000/day). In more recent cases, such as D.00-12-050, in which the operation, practices and conduct of Coleman Enterprises, Inc. (Coleman) were investigated, we adopted via settlement total fines of $800,000. Further, we suspended the fines for three years and thereafter

[16] In Communications TeleSystems International, 72 CPUC2d at 639-40, we imposed a fine of $19.6 million and suspended all but $2 million for violations of § 2889.5.

[17] At hearing CSD staff sponsored a witness from Pacific Bell and focused questions on the time period when cramming substantially decreased and was limited to very few instances. See footnote six where CSD showed that cramming occurred less than a dozen times over a three month period.

vacate the fines absent a motion from CSD to lift the suspension for non-performance of the settlement agreement terms. In Coleman, approximately 9,000 consumers were affected compared to the 43,000 in the instant case.

Taking into account Accutel's negligent versus intentional misconduct, and the severity of the offense, we impose, pursuant to § 2107, a fine of $1,520,000 (760 days x $2,000/day). Further given Accutel's remedial efforts, we will suspend the fine by $760,000 subject to Accutel demonstrating compliance with laws, and Commission orders, rules and regulations for three years. CSD may move to end the suspension if Accutel violates a law or Commission order, rule or regulation. After three years of full compliance and upon motion by Accutel, we will vacate the fine.

Although Accutel's financial resources are not exactly known, the size of the fine we impose exceeds the amount wrongfully obtained from consumers. The fine is less than the fine we imposed in Coral which involved more egregious conduct but greater than the most recently adopted fines cited above.

We direct the Commission's General Counsel to take all reasonable steps to collect this fine. All fines collected will be deposited in the State's General Fund. In the event Accutel fails to pay the imposed fine within 30 days of the effective date of this decision, we direct the Executive Director to issue an order suspending Accutel's Certificate of Public Convenience and Necessity and to take all necessary steps to ensure that Accutel ceases doing business in California, including, but not limited to, directing all California local exchange carriers and billing agents to cease doing business with Accutel.

We also require Accutel to make a compliance filing, within 30 days of the effective date of this decision, with Telecommunications Division showing authority from the Secretary of State to do business in the State of California.

Finally, today's decision is narrowly tailored to resolve the issues set forth in the OII and is based on the specific facts developed at evidentiary hearing. Today's decision does not purport to resolve any issues concerning Accutel in other proceedings.

Appeal

On November 27, 2000, CSD filed an appeal that made the following claims:

- CSD disagrees with the POD's finding that an uncertain number of California consumers were crammed. CSD contends that there is "clear, convincing and substantiated evidence" of cramming. CSD believes that the POD "gave no weight to OAN's deposition, direct, and cross-examination testimonies and records";

- CSD contends that the record does not support a finding that Accutel was negligent, instead CSD contends that Accutel's conduct was "volitional, systematic, performed with knowledge and indifference to the consequences";

- CSD alleges that the record does not support a finding that Accutel's action caused incidents of cramming to decrease after January 1999;

- CSD contends that the POD overlooks the substantial public harm caused by Accutel's "obdurate cramming";

- CSD argues that the POD fails to refute CSD's findings of slamming; and

- CSD seeks revocation, restitution and penalties.

CSD's case has not been clear and convincing.[18] However, after reviewing the record we modify the POD at pages 5-7 to find that at least 43,992 California consumers were crammed to reflect the number of credits made by OAN. We also modify the POD at page 7 to reflect CSD's assertion that over 43,992 California consumers were crammed.

[18] We observe that CSD initially presented different versions of the same exhibits to the ALJ and opposing counsel. CSD also precluded Accutel's counsel from participating in the deposition of a key witness (Evans), which later required the ALJ to postpone start of evidentiary hearings on August 27, to provide Accutel an opportunity to depose the witness.

In support of the contention that Accutel's conduct was worse than negligent, the appeal cites a letter from OAN to Accutel suspending provision of billing services for excessive complaints. This single letter is not sufficient to make a finding that Accutel's conduct was "volitional, systematic, performed with knowledge and indifference to the consequences."

Regarding the decrease in cramming after January 1999, CSD contends that "only Accutel's self-serving testimony … would sustain the POD's view of Accutel's cramming." However, CSD's appeal does not provide any citation to testimony or briefs to contest Accutel's position concerning decrease in cramming in 1999. However, in its appeal, CSD provides for the first time an alternate explanation to Accutel's theory for the reduction in cramming complaints recorded by Pacific. In its appeal, CSD attributes the decrease in incidents of cramming to the termination of the bill processing contract between OAN and Accutel. After reviewing the record, we make no change to the POD on this point.

CSD's position that substantial public harm resulted from Accutel's cramming is inconsistent with the evidence staff presented at hearings. In addition to CSD's evidence that cramming complaints decreased, CSD sponsored consumer witnesses that testified they had received refunds for erroneous charges. CSD's own appeal states that as the "POD correctly observes, many consumers were credited." However, we do agree with CSD that as a general proposition cramming is a public harm and an inconvenience to the public, and we have modified the POD consistent with that proposition.

CSD states that it "advanced clear and convincing proof of Accutel's California slamming." The clear and convincing proof that CSD refers to are

simply arguments stating that Accutel did not provide documents (verification records and customer information) to CSD.

CSD's Appeal concerning slamming fails on several grounds. As discussed earlier in today's decision, the record shows that of the 168 consumers CSD interviewed, only 34 asserted slamming violations. It does not logically follow that because CSD has identified incidents of slamming that all of Accutel's customers have been slammed. CSD's argument that the record does not contain customer verifications records also lacks merit since, as discussed earlier, CSD chose not to use discovery tools such as motions to compel and insisted on precluding Accutel from potentially presenting such exonerating evidence at hearing.

Lastly, contrary to CSD's assertion, the record developed by CSD does not justify revocation. However, we will increase the penalty based on the revised incidents of cramming found.

Findings of Fact

1. Accutel billed at least 43,992 California consumers for products or services not ordered or authorized by consumers.
2. Consumers were reimbursed for erroneous charges imposed on their phone bills.
3. Accutel switched without authorization the long distance carrier of at least 34 California consumers.
4. Accutel has not timely filed financial reports.
5. Accutel has been negligent in its provision of telecommunication services.
6. Accutel's negligence warrants the imposition of a fine.

Conclusions of Law

1. Placing charges on a person's local telephone bill based on an invalid authorization is unreasonable.

2. Unreasonable practices are prohibited by Pub. Util. Code § 451.

3. A telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized.

4. Accutel violated Pub. Util. Code § 451.

5. Accutel violated Pub. Util. Code § 2890.

6. Accutel violated Pub. Util. Code § 2889.5.

7. For reasons set forth in the foregoing opinion, Accutel should pay a penalty of $1,520,000. Further, half the penalty should be suspended subject to Accutel demonstrating compliance with laws, and Commission orders, rules and regulations for three years.

8. Accutel should make a compliance filing, within 30 days of the effective date of this decision, with Telecommunications Division showing authority from the Secretary of State to do business in the State of California.

9. This order should be made effective immediately to finally resolve this investigation.

O R D E R

IT IS ORDERED that:

1. The September 7, 1999 motion of Consumer Services Division is denied.

2. Accutel Communications, Inc., (U-5865) (Accutel) shall pay a fine of $1,520,000. Half of this fine is suspended by $760,000 subject to Accutel demonstrating compliance with laws, and Commission orders, rules and regulations for three years. CSD may move to end the suspension upon a new

violation of law or Commission order, rule or regulation by Accutel. After three years of full compliance and upon motion by Accutel, we will vacate the balance of the fine. Within 30 days of the effective date of this order, Accutel shall submit to the Manager of the Commission's fiscal office a certified check in the amount of $760,000 payable to the State of California General Fund.

3. Within 30 days of the effective date of this order, Accutel shall make a compliance filing with Telecommunications Division showing authority from the Secretary of State to do business in the State of California.

4. The Commission's General Counsel shall take all reasonable steps to collect the fine imposed by this order. All fines collected will be deposited in the State's General Fund.

5. In the event that Accutel fails to comply with Ordering Paragraphs 2 and 3, the Executive Director shall issue an order suspending Accutel's Certificate of Public Convenience and Necessity, and shall take all necessary steps to ensure that Accutel ceases doing business in California, including but not limited to directing all California local exchange carriers and billing agents to cease doing business with Accutel.

6. Accutel shall obey and comply with all laws and all orders and rules of the Commission, as applicable to Accutel's billing activity and provision of telephone service in California.

7. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.